IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

ARMOUR AND COMPANY,

Petitioner,

versus

LOUISIANA SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on August 4, 1951, and the order of said

Court denying rehearing thereof, entered on September 7, 1951.

The opinion of the majority of the Court below, with the dissenting opinion of Judge Borah, is reported in 190 Fed. (2d) 925.

For brevity we shall use herein the words "Act" as describing the Act to Regulate Commerce (Title 49, U. S. C. A.); the word "Commission" as describing the Interstate Commerce Commission; and the term "Circuit Court" as describing the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND STATEMENT OF THE MATTERS INVOLVED.

The agreed facts are as follows:

During the period December 8 to December 16, 1947, both inclusive, petitioner shipped by respondent's railroad, from New Orleans, Louisiana to the port of Braithwaite, Louisiana, for export, sixty-nine carloads of fertilizer. The cars arrived at the port on schedule. The vessel did not. As a result the fertilizer was held in cars on the tracks of respondent until the vessel arrived. Thereafter the cars were switched alongside vessel and the transfer of the cargo was made.

Prior to this period respondent, a common carrier by railroad, had published and filed with the Commission,

as required by the Act, a rate tariff. That tariff provided that where loaded cars were detained on carrier's rails, as these cars were, a charge of $2.00 per car per day would be collectible (for each day after the "free" time specified in the tariff had elapsed). No other charge for this service appeared in this or any other tariff.

Just prior to the detention of these cars, the Commission, concededly acting under authority granted in Sec. 1(15) of the Act, had entered its Service Order No. 775,* commanding this respondent (and other railroads) to suspend the $2.00 charge, and substitute a $5.00 charge for the same service, by *filing new tariffs*, putting into effect the changes ordered. The respondent railroad *did not obey that order;* did not file the new tariff suspending the $2.00 charge and making effective the $5.00 charge, until *after* the car detention here involved had occurred.

The application of the only tariff charge (viz. $2.00 per car per day) to the detention actually experienced here, resulted in a liability of petitioner to respondent aggregating $1062.00. This amount petitioner has tendered and offered to pay. Respondent brought this action at law to recover for the transportation service rendered a charge named in no rate tariff, of $5.00 per car per day, or $5,801.40. The sum sued for is exactly the sum which *would* have been due *if* the respondent had amended its tariff *before*, rather than *after*, the car detention had occurred.

---

* Reproduced in full as Appendix 1 hereto.

Errata:

The following footnote in connection with the first reference to the $5.00 demurrage charge on Page 3 was inadvertently omitted on final printing of this petition:

"In the interest of simplicity the single figure of $5.00 per car per day is used herein in lieu of the intricate new sliding scale of charges of $3.30 per car for the first two days, $5.50 for the third day, $11.00 for the fourth day, and $16.50 for the fifth and each succeeding day, actually appearing in the Commission's order as the figures required to be published in carriers' tariffs."

THE STATUTES INVOLVED.

Section 6(7)** of the Act provides:

> "No carrier * * * shall * * * charge or demand or collect or receive a *greater or less or different compensation* for such transportation**, or for any service in connection therewith, between the points named in such tariffs, *than the rates, fares, and charges which are specified in the tariff, filed and in effect at the time* * * * *." (Emphasis supplied.)

Section 6(3)** provides:

> "No change shall be made in the rates, fares, and charges * * * which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made * * *; *and the proposed changes* shall be shown by *printing new schedules*, or shall be *plainly indicated upon the schedules in force at the time* * * *." (Emphasis supplied.)

THE QUESTIONS PRESENTED.

The writers of both the majority and dissenting opinions agree that the service here rendered was a transportation service, and that the charge, and the tariff naming it, were within the ambit of Section 6 of the Act.* So considered

---

** The entire section appears in full in Appendix 2 hereto.

* In considering the service rendered here as transportation service rather than car service, the Circuit Court is wholly consistent with the decision of the Supreme Court in Peoria & P. U. R. Co. vs. U. S., 263 U. S. 528, 68 L. Ed. 427, 44 S. Ct. 194. There this Court pointed out that the factors included in the term "car service" were definite in the statute, and that the switching of cars was not a service included in the definition, since there is no mention in that statute of the tariff charges to be paid by the shipper, it follows that they also are excluded from the term "car service" as defined in the Act.

it is of no particular significance that the rate involved was a rate for car detention rather than a "line-haul" rate from one point to another. The Court's decision was that the commission has power to set aside, instanter, *any* rate or charge named in *any* railroad tariff: "Any printed schedule (of rates) contrary to orders of the Commission is *not effective.*"

Stated in its broadest terms, and stripped of accidental detail, the basic issue presented by this application is one of precedence:

1. The only rate tariff legally in effect names a certain rate for a given transportation service; a contemporaneous order of the Commission commands the carrier to collect a different rate for the same service, which different rate does not appear in any tariff. The statute specifically forbids the collection of any rate "greater or lesser or different" than that named in the tariff; the order of the Commission (the creature of the statute) commands the carrier to violate the statute by charging an amount "greater" than and "different" from the rate found in the only applicable rate tariff. The question is simply: Which of these conflicting directives is to prevail?

Implicit in or necessarily incidental to this fundamental question are the following:

2. The statute prohibits any change in a legally established tariff rate for particular transportation service by any means other than the filing of a new tariff; the order

of the Commission, *as interpreted by the Circuit Court,** purports effectively and instanter to change the rate in question without any new tariff. Is this irreconcilable conflict to be resolved in favor of the statute, or in favor of the Commission's order to the contrary?

3. Can an order of the Commission possibly be a "valid order" (as assumed by the Circuit Court) which changes a rate in a manner *forbidden* by the statute and compels a carrier to *violate* the statute by charging a rate "greater or less or different" than the rate named in its tariff for that service?

4. Has the Commission the power to change a tariff rate instanter and to dispense with the requirement that the new rate appear in a tariff on file with the Commission or to compel a carrier to disregard its own rate tariff by charging a rate not appearing in any tariff?

SPECIAL AND IMPORTANT REASONS, ETC.

The Decision of the Circuit Court is in Conflict with Every Decision of this Court or of the Courts of Appeal of Other Circuits, Wherein Sections 6(3) or 6(7) of the Act have been Interpreted or Applied.

The prohibitions contained in Sections 6(3) and 6(7) of the Act appeared in the original Act of 1887 and have

---

* We do not believe that the Commission's Order had this purport, as Subparagraph (g), ordered each railroad, or its agent, to publish, file and post a supplement to each tariff affected thereby:
"... announcing the suspension of the operation of any of the conflicting provisions therein, and establishing the substituted provisions set forth herein."

remained in effect continuously ever since. In the past sixty-four years, this Court and the Courts of Appeal of other circuits have been repeatedly called upon to interpret and apply the language of those sections. There are other provisions of the original act which later were radically changed, as a result of which former decisions of this Court interpreting those sections no longer apply. But as to Sections 6(3) and 6(7), a decision of this Court made in 1890 or 1900 is a decision interpreting and applying language which remains in the Act today.

We cannot, with due regard for brevity, cite all of the decisions of this Court and of the Courts of Appeals of other circuits, with which the decision of the Circuit Court here conflicts. Suffice it to say, in holding that a rate, conceded to be the *only rate named* in *any* lawful tariff for the service rendered, can not lawfully be observed; in holding that a carrier may under *any* condition lawfully charge a "greater or less or different" amount than that named in the tariff; in holding that an effective tariff rate may be changed by any method other than the only method of change permitted by the statute; the decision of the Circuit Court *conflicts with every known pronouncement of this Court, of the Courts of Appeal of other Circuits, of the Interstate Commerce Commission, and of the State Courts on this particular point.* We shall refer only to those decisions reflecting the most patent and outstanding conflict.

The Decision of the Circuit Court is in Conflict with the Decisions of this Court in the Following Cases, for the Following Reasons:

In *Davis v. Portland Seed Co.*, 264 U. S. 403, 68 L. Ed. 762, 44 S. Ct. 380, the tariff named a rate which clearly, openly and flagrantly violated the provisions of the fourth section of the statute. After pointing out that the tariff rate violated the statute, and that the carrier was subject to prosecution for that violation, this court said:

> "The statute required rigid observance of the tariff, *without regard to the inherent lawfulness of the rate specified.* It commanded adherence to the published rate from Roswell; § 6 forbade any other charge." (p. 425.)

The Circuit Court here finds that the tariff rate became unlawful, not because it violated the *statute*, but because it existed in disregard of an *ex parte order* of the Commission. The only possible reconciliation of the two decisions is to say that an administrative requirement of the Commission is so much more important than the requirement of the statute, that we may *follow* the rule in the *Portland Seed* case when the tariff violates only the *statute*, but must depart from that rule when the rate contravenes an *ex parte order* of the Commission, the statute's creature.

The decision is in direct conflict with the decisions of this court in *American Express Co. v. U. S.*, 212 U. S. 522, 53 L. Ed. 635, 29 S. Ct. 315, where, at page 532 the intent of Congress was found to be "to prevent a departure from the published rates * * in *any manner whatsoever*".; in

L. & N. R. R. vs. Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, where it was held, at page 477, that a carrier "cannot depart to *any* extent from its published * * rates * * without incurring the penalties of the statute"; in *Dayton Iron Co. v. C. N. O. & T. P. R. Co.*, 239 U. S. 446, 60 L. Ed. 375, 36 S. Ct. 137, holding it essential that the tariff rates "while in force shall be the *only* rates which the carrier may lawfully receive"; in *Armour Packing Co. v. U. S.*, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428 when at page 81 the law was stated to provide for the "establishing of *one rate*, to be filed as provided, *subject to change*, as provided, and *that rate* to be, while in force, the *only* legal rate"; also "one rate is to be charged and that the one fixed and published in the manner pointed out in the statute and *subject to change in the only way open* by that statute"; in *Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 156, 67 L. Ed. 183, 43 S. Ct. 47, where at page 163, the rights defined in the tariff "cannot be enlarged, by either contract or tort of the carrier"; or in *Penn. R. R. vs. Int. Coal Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 S. Ct. 893, wherein at page 197 this Court described the statute as requiring a carrier "to abide absolutely by the tariff".

The Decision is Either in Conflict with Decisions of this Court and of the Courts of Appeal of Other Circuits Holding Tariff Provisions to be Equivalent to Acts of Congress, or the Circuit Court has Erroneously Held that the Commission is Empowered to Override an Act of Congress.

This court and the Courts of the several circuits have often referred to a tariff rate as occupying the status of an act of Congress. In *Penn. R. R. vs. Int. Coal Co.*, 230

FILED
DEC 6 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 467

ARMOUR AND COMPANY,
Petitioner,

versus

LOUISIANA SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PAUL E. BLANCHARD,
4301 So. Racine Ave.,
Chicago 9, Ill.,
HARRY McCALL,
724 Whitney Building,
New Orleans 12, Louisiana.

HARRY McCALL, JR.,
Of Counsel.

U. S. 184, 57 L. Ed. 1446, 33 S. Ct. 893, this court, at page 197 described the effective tariff to be treated "as though it were a statute binding as such upon railroad and shipper alike. If as a fact rates were unreasonable* the shipper was nevertheless bound to pay * *." In the Eighth Circuit the Court described the tariff "to be treated as though it were a statute" (*Pillsbury Flour Mills vs. Gt. Northern Railway*, 25 Fed. (2d) 66, 68). In the Tenth Circuit the Court of Appeals described the railroad tariff as having "the force and effect of a statute" (*Chicago Great Western R. Co. v. Farmers Shipp. Assoc.*, 59 Fed. (2d) 657, 659). In the Sixth Circuit the Courts of Appeal stated that the rate tariff was to be "treated as though it were a statute" (*Boone v. U. S.*, 109 Fed. (2d) 560, 562). Even this Circuit Court has previously held the status of a published tariff to be that of a statute "to be strictly applied regardless of the hardships that may arise * * in particular cases" (*Bull S. S. Line vs. Thompson*, 123 Fed. (2d) 943, 944).

In the case at bar the Court does not openly disagree with these pronouncements. We are left to assert error in the alternative. Either the Circuit Court failed to observe and follow this great weight of authority, and relegated the tariff to a status lower than a statute; or it follows that *it has given the Commission the power to repeal and set aside ex parte something occupying the position of an act of Congress.*

* Also a violation of Section 1 of the Act.

The enormity of the error is apparent when it is noted that this same Circuit Court in the case last above cited, held

> "*Courts* may not strike down the plain and unambiguous terms of tariffs set up and approved by the Interstate Commerce Commission." (p. 944.)

The necessary conclusion is that although the tariff containing the $2.00 rate was "set up and approved" in the first instance, by the Commission; although it thereupon assumed the finality of a statute; although being plain and unambiguous, no *court* could strike it down, *yet the Commission could strike it down by mere ex parte order.*

The Decision is in Direct Conflict with the Decision of the Court of Appeals for the Third Circuit in American Sugar Refining Co. vs. D. L. & W., Wherein it Was Held that no Orders of the Commission Could Affect or Set Aside a Tariff Rate in any way, Save After Investigation and Issuance of an Order, to Become Effective Not Less Than Thirty Days After its Issuance.

Our search of the citators and digests have revealed but one decision which is harmonious with the decision of the Circuit Court here. That case was the decision of the United States District Court for New Jersey, later reversed (207 Fed. 733), in *American Sugar Refining Co. v. D. L. & W.*, 200 Fed. 652. There the District Court held at page 654 where the tariff named a rate, and a decision of the Commission commanded the collection of a different rate and threatened prosecution of the carrier for continuation of the condemned tariff rate, the directive of the Com-

mission was self executing, and controlled and set aside the tariff.

> "The effect of the Commission's decision was to *eliminate* such allowances from the filed tariffs. * * * They (the railroad) were as much bound to refrain from making such rebates, from the time of such decision * * * *as if the tariffs had never contained such allowances.*" (p. 654, Emphasis added.)

The above language is entirely in accord with the language of the Circuit Court here which is:

> "As a valid order of the Interstate Commerce Commission *superseded and effectively suspended tariff provisions theretofore in effect,* and likewise validly established the new demurrage charges from which the recovery sought and allowed in the present case was computed, the failure of the carrier to comply with the order of the Commission that it give notice of such suspension and fixing of new demurrage charges did not, and could not, legally annul the Commission's order." (Pg. 8.)

The above decision of the District Court was *not allowed to stand.* On prompt appeal to the Court of Appeals for the Third Circuit, the reasoning of the District Court was reversed in *toto,* and the law was stated, to be as follows:

> "When such schedules" (or rates) "are once filed with the Commission * * * *they may not in any respect be changed, altered, or modified, except in the manner prescribed by the Act.* * * * Such is the express mandate of the third paragraph of Section 6 * * *. (p. 739.)

* * * * * * * *

"* * * There is no provision in the Act * * * which permits a tariff provision to be set aside or be discarded or cancelled by the carrier, except by the filing of a new tariff, which was not done in this case * * * there is *no* provision in the Act *by which the Commission can bring about a condition under which the carrier will be authorized to disregard a tariff provision*, except by an order *entered in pursuance* of an investigation made under the provisions of Section 15 of the Act * * * requiring the carrier to "cease and desist from such violation" of the act, as the Commission may find exists, and making such order effective within such reasonable time, not less than 30 days * * * as shall be prescribed in the order of the Commission". We *cannot, therefore, agree* that the effect of the Commission's report or decision * * * *was ipso facto to eliminate such allowances from the file tariffs.*" (207 Fed. 733, 742; Emphasis supplied.)*

Thus the sole authority in accord with the theory of the Circuit Court here was squarely reversed by a court of equal rank, the Court of Appeals for the Third Circuit. The decision here is in diametrical opposition to that of the Court of Appeals for the Third Circuit above cited.

The Decision is in Conflict with a Decision of the Court of Appeals for the Eighth Circuit, Wherein it was Held that a Decision of the Commission, Striking down the tariff rate and naming a Lower Rate, Could Not Affect the Collection of the Rate Carried in the Tariff.

There is not a proceeding brought before the Commission in which an interval does not necessarily elapse be-

*The order here was ex parte, not entered "under the provisions of Section 15", which Section makes a full hearing, and the entry of findings of fact conditions precedent to the form granted in that section.

tween the date the Commission finds the assailed rate to be unreasonable, or otherwise violative of the Act, and the date the new rate appears in a new tariff. In fact Section 15(2) of the Act specifically prohibits any such order from becoming effective in less than thirty days.

The contention has been advanced that since the Commission found on a certain date that the tariff rate violated the law on that date, that such finding invalidated the collection of the higher unreasonable rate *still carried in the tariffs* up to the time of their change by the filing of a new rate.

Such a situation was presented in the decision of the Court of Appeals for the Eighth Circuit in *C. B. & Q. R. R. Co. vs. Merriam, et al.*, 297 Fed. 1. There the tariffs contained a rate on grain of 81½ cents. After due hearing the Commission on October 21, 1921 found that rate to be unreasonable in violation of Section 1 of the Act.

The order commanding the reduction of the rate to 64 cents was dated November 21, 1921. The date fixed for publication of the reduction was December 27, 1921. The shipper sought recovery on shipments made before December 27, when the tariff still named 81½ cents as the only rate. The Circuit Court disposed of the claim, as follows, at page 3 of the decision:

> "The claim that the rate was unlawful cannot be sustained. The duly filed and published tariff rate, while it was in force, was the only lawful rate. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, * * *
>
> "It is not claimed that the carrier had made any change of these tariff rates at the time of these shipments. The report and opinion of the Commission

filed on October 20, 1921, did not purport to and *could not annul or change the existing tariff rate.*"

The Decision is in Conflict with a Decision of the Court of Appeals for the Eighth Circuit Wherein it was Held that a Tariff Published in Complete Disregard of the Directives of the Commission, Must Nevertheless be Observed and the Rates Named therein Collected.

Under Section 6(6) of the Act the Commission is empowered to make rules and regulations governing the form and manner in which rates shall be published in tariffs.

In *Chicago I. & L. Ry. Co. vs. Int. Milling Co.*, 43 Fed. (2d) 93 (Cert. denied 282 U. S. 885, 75 L. Ed. 781, 57 S. Ct. 89), the Court of Appeals for the Eighth Circuit had before it an order of the Commission requiring that in "changing" a rate (by filing a new tariff as required by Section 6(3)) certain provisions must appear in the new tariff cancelling the supplanted rate *before it could become effective.*

The carrier had lawfully published a 17 cent rate from Chicago to Louisville by tariff filed October 20, 1924. On November 28, 1925 it published a new tariff naming a 10 cent rate between the same points. This new tariff *did not comply with the Commission's order* above referred to. The claim was advanced that the new 10 cent rate was a nullity because the tariff naming that rate openly violated the Commission's order.

The order of the Commission there involved was found in Rule 8 of its tariff Circular 18-A. The Court's decision was:

> "Even if rule 8 of Circular 18-A* had the force and effect of a statute, it would not supersede paragraph

*Circular 18-A was an order of the Commission issued pursuant to Section 6(6) prescribing rules to be followed in publishing tariffs.

3, sec. 6, of the statutes heretofore cited, which established the method of changing rates. There were *no directions to the shipper* under said rule 8—they were *to the carriers.* The failure to follow the rule was entirely the failure of the carrier. The fact that tariff 520-C did not conform to rule 8 of Circular 18-A of the Commission, in that it failed to state that the previously established rate was canceled, *was not sufficient in our judgment to render it ineffective;* nor was the failure to file a corresponding amendment to Jones tariff 100-R."

In the above case, and in the case at bar, the commission had commanded the carrier *to do something.* In each case the carrier had *failed to obey* the order. The above decision holds the tariff statute and the tariff to be inviolate despite the violation of the Commission's order. The court below holds the tarift worthless because it violates the Commission's order. The two decisions are in obvious conflict.

Respectfully submitted,

(SGD.) **HARRY McCALL**

PAUL E. BLANCHARD,
4301 So. Racine Ave.,
Chicago 9, Ill.,
HARRY McCALL,
724 Whitney Building,
New Orleans 12, Louisiana,
Attorneys for Petitioner.

HARRY McCALL, JR.,
Of Counsel.

APPENDIX 1

(S. O. 775)

Part 95—Car Service

Demurrage on Railroad Freight Cars

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 9th day of October A. D. 1947.

It appearing, that railroad freight cars are being delayed unduly in loading and unloading, or while held for orders, bill of lading, payment of freight charges, reconsignment, diversion, reshipment, inspection or forwarding directions, causing a shortage of equipment and impeding and diminishing the use, control, supply, movement, distribution, exchange, interchange, and return of such cars; in the opinion of the Commission an emergency requiring immediate action exists in all sections of the country: it is ordered that;

Sec. 95.775 Demurrage on railroad freight cars—(a) Cars not subject to an average agreement. After the expiration of free time when detention of cars occurs, for which charges are or may be lawfully provided by tariffs, the demurrage charges on railroad freight cars not included in an average agreement, held for orders, bill of lading, payment of freight charges, reconsignment, diversion, reshipment, inspection, forwarding directions, loading or unloading shall be $3.30 per car per day or a fraction thereof for the first two (2) days; $5.50 per car per day or a fraction thereof for the third day; $11 per car per day or a fraction thereof for the fourth day; and $16.50 per car per day or a fraction thereof for each succeeding day.

(b) Cars subject to an average agreement. After the expiration of free time when detention of cars occurs, for which charges are or may be lawfully provided by tariffs, the demurrage charges on railroad freight cars, included in an average agreement, held for orders, bill of lading, payment of freight charges, reconsignment, diversion, reshipment, inspection, forwarding directions, loading or unloading shall be $3.30 per car per day or a fraction thereof for the first two (2) days; $5.50 per car per day or a fraction thereof for the third day; $11 per car per day or a fraction thereof for the fourth day; and $16.50 per car per day or a fraction thereof for each succeeding day. The $3.30 per day debit charges may be offset or reduced by accrued credits as provided in applicable demurrage tariffs: Provided, however, That the $5.50 per day, $11 per day, and $16.50 per day charges may not be offset or reduced, except on runaround cars.

(c) Application. (1) The provisions of this section shall apply to intrastate and interstate traffic as well as foreign traffic, subject to the following exceptions:

Exceptions: Import, export, coastwise (including Great Lakes) or intercoastal bulk freight (including vessel fuel coal and coke) or explosives traffic, during the period such traffic is held in cars at ports for transfer to vessels or held at United States-Canadian border crossings, is not subject to this section. Bulk freight means any carload freight consisting of any non-liquid, non-gaseous commodity shipped loose or in mass and which in the unloading thereof is ordinarily shoveled, scooped, forked, or mechanically conveyed, or which is not in containers or in units of such size as to permit piece by piece unloading.

(2) Description of cars subject to this section. This section shall apply to cars suitable for interchange described under the headings Class G—Gondola Car Types; Class H—Hopper Car Type; Covered Hopper Cars having a mechanical designation "LO", Gondolas "MWB", Class "S", Stock Cars, Class "R", Refrigerator Cars, Closed Box Cars having a mechanical designation in the current Railway Equipment Register prefixed by "X" or "V", also "BX" but only when the latter cars are used in freight service; and Flat Cars except special flat cars of AAR mechanical designation "LF" or "LFA".

(3) Service orders. The provisions of this section shall not be construed to alter the provisions of Service Order No. 70 (8 F. R. 8515) as amended (8 F. R. 8515), 11 F. R. 8451; 12 F. R. 3032; or Revised Service Order No. 112 (9 F. R. 11278-79) 9 F. R. 12656, 10 F. R. 341, 8867, 14575; 11 F. R. 2383, 10304, or Service Order No. 135 (8 F. R. 9569) as amended (8 F. R. 1091; 11 F. R. 8451; 11077; 12 F. R. 840, 4001). The provisions of this section shall not apply to detention of refrigerator cars utilized in accordance with the provisions of Fifth Revised Service Order No. 104 (12 F. R. 6223).

(4) Run-around cars. Allowance for run arounds attributable to railroad errors or failures in switching, on cars subject to average agreement, shall not be made except on cars held beyond the first two debit days. Those two debits may be offset by accrued credits.

(d) Effective date. This section shall become effective at 7:00 a. m., October 15, 1947 and the provisions of this section shall apply only to cars on which the free time expires on or after the effective date hereof.

(e) Expiration date. This section shall expire at 7:00 a. m., May 1, 1948, unless otherwise modified, changed, suspended or annulled by order of the Commission.

(f) Tariff provisions suspended. (1) Except as provided in subparagraph (2) of this paragraph the operation of all rules, regulations or charges, insofar as they conflict with the provisions of this section, is hereby suspended.

(2) This section shall not change Demurrage Rule 8 of Agent B. T. Jones' Tariff I. C. C. No. 3963 as amended or as reissued or similar rules in other tariffs, relating to adjustment, cancelling or refunding demurrage charges arising from the unusual conditions or circumstances described in the said Rule 8 or similar rules in other tariffs.

(g) Announcement of suspension. Each railroad, or its agent, shall publish, file and post a supplement to each of its tariffs affected thereby, in substantial accordance with the provisions of Rule 9 (k) of the Commission's Tariff Circular No. 20 (Sec. 141.9 (k) of this chapter) announcing the suspension of the operation of any of the conflicting provisions therein, and establishing the substituted provisions set forth herein.

It is further ordered, that this order shall vacate and supersede Fourth Revised Service Order No. 180, Fifth Revised Service Order No. 180, Revised Service Order No. 369, and Revised Service Order No. 653 on the effective date hereof; a copy of this order and direction be served upon the State railroad regulatory bodies of each State, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the

terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(Sec. 1, 24 Stat. 379, as amended, 40 Stat. 101, Sec. 402, 41 Stat. 476, sec. 4, 54 Stat. 901; 49 U. S. C. 1 (10)—(17).)

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

(F. R. Doc. 47-9278; Filed Oct. 15, 1947; 8:46 a. m.)

(Copied from 12 Fed. Reg. 6784-5 (16 Oct. 1947).)

(S. O. 775, Amdt. 1)

Part 95—Car Service

Demurrage on Railroad Freight Cars

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 24th day of October, A. D. 1947.

Upon further consideration of Service Order No. 775 (12 F. R. 6784), and good cause appearing therefor: It is ordered that:

Section 95.775 Demurrage on railroad freight cars of Service Order 775 be and it is hereby amended by substituting the following paragraph (c) (2) for paragraph (c) (2) thereof:

(c) Application. • • •

(2) Description of cars subject to this order. This order shall apply to all freight cars subject to published demurrage charges on file with the Interstate Commerce Commission or State Commissions.

Effective Date. This amendment shall become effective at 7:00 A. M., November 1, 1947.

Computation of demurrage on effective date of amendment. The number of days a freight car has been held prior to the effective date of this amendment, counted according to demurrage tariff rules shall determine the charges applicable on that car on and after the effecitve date of this amendment.

It is further ordered, a copy of this amendment be served upon the State railroad regulatory bodies of each State, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(Sec. 1, 24 Stat. 379, as amended, 40 Stat. 101, sec. 402, 41 Stat. 476, sec. 4, 54 Stat. 901; 49 U. S. C. 1 (10)-(17).)

By the Commission, Division 3.

W. P. BARTEL,
(Seal) Secretary.

(F. R. Dec. 47-9672; Filed, Oct. 29, 1947; 8:48 a. m.)

(Copied from 12 Fed. Reg. 7059 (30 October, 1947).)

(S. O. 775, Amdt. 2)

Part 95—Car Service

Demurrage on Railroad Freight Cars

At a session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 5th day of December A. D. 1947.

Upon further consideration of Service Order No. 775 (11 F. R. 6784) as amended, (12 F. R. 7059), and good cause appearing therefor: It is ordered that:

Section 95.775 Demurrage on railroad freight cars of Service Order 775 as amended, be and it is hereby further amended by substituting the following paragraph (c) (2) for paragraph (c) (2) thereof:

(2) Description of cars subject to this section. This section shall apply to all freight cars subject to published demurrage charges on file with the Interstate Commerce Commission or State Commissions, except freight cars not suitable for interchange when such cars are used in intra-plant or interplant service.

Effective date. This amendment shall become effective at 7:00 a. m., December 12, 1947.

It is further ordered, a copy of this amendment be served upon the State railroad regulatory bodies of each State, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be

given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(Sec. 1, 24 Stat. 379, as amended, 40 Stat. 101, sec. 402, 41 Stat. 476, sec. 4, 54 Stat. 901; 49 U. S. C. 1 (10)-(17).)

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

(F. R. Doc. 47-10938; Filed, Dec. 11, 1947; 8:50 a. m.)

(Copied from 12 Fed. Reg. 8349 (12 Dec. 1947).)

APPENDIX 2

49 U. S. C. A. Sec. 6(3)

"Change in rates, fares, etc.; notice required; simplification of schedules. No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the commission may, in its discretion and for good cause shown, allow

changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, or charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest."

49 U. S. C. A. Sec. 6(7)

"*Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
STATUTES INVOLVED	4
ARGUMENT	8
CONCLUSION	13

AUTHORITIES

TABLE OF STATUTES

Esch Car Service Act	5, 6
Interstate Commerce Act	4

TABLE OF CASES

American Sugar Refining Co. v. D. L. & W. Ry. 207 Fed. 733	8
Avent v. United States 266 U. S. 127	6
Chic. B & Q Ry. v. Merriam & Millard Co. 297 Fed. 1	8
Chic. I & L Ry. v. Int. Milling Co. 43 Fed. (2d) 93	8, 9
Chic. etc. R. Co. v. Bernard-White Coal Co. 171 Ill. App. 302	14
Chic. M. & St. P. Ry. v. McCree 91 Fed. Supp. 57	6
Iversen et al. v. United States 63 Fed. Supp. 1001	6
Peoria & P. U. Ry. v. United States 263 U. S. 528	6
United States v. Koenig Coal Co. 270 U. S. 512	6
United States v. Mich. Portland Cement Co. 270 U. S. 521	6, 10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 467

ARMOUR AND COMPANY,
Petitioner,

versus

LOUISIANA SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

STATEMENT OF MATTERS INVOLVED.

The summary and statement of the matters involved in the petition for certiorari does not correctly present the case because it persists in treating the case as if it were an attempt by the carrier to charge for a transportation service at a rate different from a lawfully established tariff. The true fact is, that the operation of the tariff upon which petitioner claims to rely, had been sus-

pended by a valid car service order of the Interstate Commerce Commission, which order was in effect at the time that the demurrage accrued.

Secondly, the statement is incorrect because it refers to the suit as an action at law to recover for a transportation service, whereas the suit is for demurrage charges for car service as prescribed by Service Order No. 775 of the Commission. These demurrage charges were not based upon some transportation service rendered by the carrier, but arose because the shipper, Armour & Company, elected to use the freight cars for storage purposes instead of promptly unloading them on arrival at Braithwaite. The duty of unloading such shipments rested upon Armour & Company, and the purpose of the demurrage charges was to promote car efficiency by penalizing undue detention of cars. The true nature of such charges was defined in *Iversen et al. v. United States et al.*, 63 Fed. Supp 1001, affirmed 327 U. S. 767, 90 L. Ed. 998, 66 Sup. Ct. 825, rehearing denied 327 U. S. 819, 90 L. Ed. 1041, 66 S. Ct. 963 where the Court said:

> "From the foregoing, it seems clear that demurrage charges are in part compensation and in part penalty; that in full character they are neither, *not being rates* as that term is used in connection with rate making, nor penalties as that term is used in respect to penal impositions. They are *sui generis*. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as *carrier charges* and as penalties. *As an integral part*

of the rules and regulations in respect to car service they fall within the provisions of Section 1 (15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing issue, effective for a limited time orders in respect to these charges." (Emphasis supplied.)

That is exactly the situation here. The Commission found that an emergency, to-wit, a car shortage existed, and issued Service Order 775.

Finally, the statement is not correct because although service Order No. 775 is reproduced in full in the Appendix, its summary in the petition is apt to be misleading.

A clear and concise statement of the facts and matters involved is found in the first paragraph of the opinion of the Court of Appeals for the Fifth Circuit, 190 Fed. (2d) 925, (Rec. pp. 38-39), which reads:

"RUSSELL, Circuit Judge: 'This is an appeal by the defendant from a summary judgment entered in favor of the plaintiff. The action was brought by the appellee railway company to collect from the appellant, Armour and Company, demurrage charges at the rate stated and prescribed by the Interstate Commerce Commission in its Service Order No. 775. The demurrage charges prescribed by the Commission were greater than those set up and published in the tariff of the railway company. The appellant defended upon the ground, which is likewise urged here, that the demurrage rates as set forth in the railway company's published tariff schedule, on file with the Interstate Commerce Commission, con-

clusively evidenced the extent and amount of permissible recovery since the carrier had failed to publish the changed rates as a supplement to its tariff. The railway company contends that it is entitled to, and must, recover demurrage at the rates prescribed by Service Order No. 775, which had been issued prior to the time during which the demurrage charges accrued.' "

STATUTES INVOLVED.

In its statement of the statutes involved, petitioner refers only to Section 6 (3) and 6 (7) of the Interstate Commerce Act (49 U. S. C. A.). The statement makes no reference to Section 1 (10)-(17) of the Act despite the fact that, as stated in the opinion of the Circuit Court, "Thus is presented what we deem to be the real question in the case, that is whether the Interstate Commerce Act, as amended and particularly the provisions of Section 1 (15) thereof, authorizes the Commission in the discharge of its powers in case of emergency of railroad freight car shortage, to prescribe and fix demurrage rates and suspend those therefore in effect, so that such provisions and rates thereby become effective even if a carrier disobeys the Commission's order to publish the announcement of its suspension of rates theretofore in effect."

The applicable statutes are therefore:

Sec. 1 (10) which reads:

" '*Car service' defined.* The term 'car service' in this chapter shall include the use, control, supply,

movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

and Sec. 1 (15) which reads in part as follows:

"*Powers of commission in case of emergency.* Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any and all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people * * *."

Sections 1 (10)-(17) were added to the Interstate Commerce Act by the Esch Car Service Act of May 29, 1917, c. 23, 40 Sta. 102, and were amended to read as presently set forth in the U. S. Code by the Transportation Act of 1920.

The sections pertaining to car service have been construed by this Court a number of times, the relevant decisions being as follows: *Peoria & P. U. Ry. Co. v. U. S.*, 263 U. S. 528, 68 L. Ed. 427, 44 S. Ct. 194; *Turner D & L Lbr. Co. v. Chic M & St. P. Ry.*, 271 U. S. 259, 70 L. Ed. 934, 46 S. Ct. 530; *Avent v. United States*, 266 U. S. 127, 69 L. Ed. 202, 45 S. Ct. 34; *United States v. Mich. Portland Cement Co.*, 270 U. S. 521, 70 L. Ed. 713, 46 S. Ct. 395; *U. S. v. Koenig Coal Co.*, 270 U. S. 512, 70 L. Ed. 709, 46 S. Ct. 392.

The law has also been construed in the following cases by lower Federal Courts, to-wit: *Iversen v. United States*, 63 Fed. Supp. 1001, aff. 327 U. S. 767, 90 L. Ed. 998, 66 S. Ct. 825, rehearing denied 327 U. S. 819, 90 L. Ed. 1041, 66 S. Ct. 963; *Chic. M. & St. P. R. Co. v. McCree*, 91 Fed. Supp. 57; *U. S. v. Thompson*, 58 Fed. Supp. 213

Of all the cases cited in the petition for certiorari, only one mentions, or even has any reference to car service. That is the decision of this Court in *Peoria and P. U. Rwy. v. U. S., supra.* We are unable to understand why petitioner refers to that case, as it certainly does not support petitioner's contention. On the contrary it bears out the decision of the Circuit Court that the service order herein was issued under the emergency power vested in the Commisison. In the *Peoria* case this Court said:

> "The Commission possessed no emergency power prior to the so-called Esch Car Service Act. * * *"

The decision also drew the distinction, which petitioner persists in ignoring, between a transportation service and "car service". Said the Court,

> "But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service by means of them."

A footnote (7) to the decision as reported in 68 L. Ed. 430 gives the Congressional history of the car service provisions of the Act. We submit that the *Peoria* case is authority against petitioner's contention that its admitted detention of the freight cars was a transportation service and not a "car service".

It is conceded by petitioner that the Commission acted under the authority granted in Section 1 (15) of the Act in entering its Service Order No. 775 and that the Service Order was entered prior to the time demurrage accrued. (Pet. p. 3.)

The rules of this Court (Rule 38 par. 4 (b)) indicate the character of reasons which will be considered by the Court in considering an application for certiorari. We submit that the petition does not set forth any of the reasons stated in the rule. This brief will therefore be confined to the following points:

Point A. *The decision of the Circuit Court was not in conflict with the decisions of any other Circuit Court of Appeals on the same matter.*

Point B. *The question decided herein has been settled by this Court.*

Point C. *The decision of the Circuit Court is in harmony with applicable decisions of this Court.*

ARGUMENT.

A.

The Decision of the Circuit Court does not Conflict with the Decision of any other Circuit Court of Appeals.

To support its contention on this point, the petitioner cites three cases, to-wit: *American Sugar Refining Co. v. Del. L. & W. R. Ry. Co.*, 207 Fed. 733; *Chicago B. & Q. Ry. Co. v. Merriam & Millard Co.*, 297 Fed. 1 and *Chicago I. & L. Ry. Co. v. Int. Milling Co.*, 43 Fed. (2d) 93 (Cert. denied 282 U. S. 885, 75 L. Ed. 781, 57 S. Ct. 89).

None of these cases conflict with the decision herein. None of them dealt with the same subject matter, to-wit—the meaning and effect of a car service order issued under the emergency powers conferred on the Commission by the Esch Car Service Act of 1917.

The *American Sugar Refinery* case, decided in 1913, dealt with line haul shipments between 1908 and 1909 and merely held that the Interstate Commerce Commission did not, as of that date, have power to annul or change a rate, regulation or practice established by a railroad company by its filed and published schedules, except by a formal order made in conformity with Section 15 of the Interstate Commerce Act of Feb. 4, 1887. Obviously that decision rendered in 1913 could not construe the sections which were added to the Act in 1917.

The *Merriam* case likewise does not support petitioner's contention. That case merely held that the duly filed

and published rate *while it was in force* was the only lawful rate. (Emphasis supplied.)

In this case Service Order 775 provided that the operation of all rules, regulations and charges, insofar as they conflict with the provisions of the order, were thereby suspended (Pt. p. 20) and the same order specifically fixed the demurrage at the rates sued on.

Chic. I. & L. Ry. Co. v. Int. Milling Co. likewise has no bearing on this case. It dealt with regulations issued by the Interstate Commerce Commission under authority of *Section 6* of the Act. This case deals with an order issued by the Commission under *Section 1 (15)* of the Act. In that case the Court said:

> "Undoubtedly some of the rules of the Interstate Commerce Commission fairly within the powers expressly conferred by Congress, have the force and effect of statutes."

Everyone of the cases relied upon by petitioner is based upon a lawfully established tariff in existence during the period in question. In this case the prior lawfully established tariff had been suspended by the Commission acting with the scope of its conceded emergency power. While an established tariff approved by the Interstate Commerce Commission must be observed, a tariff expressly suspended by the Commission has no such effect.

B.

The Question Decided by the Circuit Court of Appeals has been Settled by this Court.

The decision of the Circuit Court was that Service Order 775 was a valid exercise of emergency power granted to the Commission; that as such it had the force of law and that reproduction thereof in a railroad's tariff was not necessary to make it effective.

That is exactly what this Court held in *U. S. v. Michigan Portland Cement Co.*, 270 U. S. 521, 70 L. Ed. 713, 46 S. Ct. 393, where the Court said:

> "Service Order No. 23 herein was issued under the Transportation Act and had the force of law. Avent v. United States, 266 U. S. 127, 131, 69 L. Ed. 202, 45 Sup. Ct. Rep. 34; United States v. Grimeaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480. In the absence of a specific requirement for its publication in a tariff, either in the Act authoring the service order or in the Elkins Act, we can find no reason for making it essential in the enforcement of the Statute and no case is cited to suggest one."

In *Turner D. & L. Lumber Co. v. Chic. M. & St. P. Railway Co.*, 271 U. S. 259, 70 L. Ed. 934, 46 Sup. Ct., 530 speaking of car service orders issued by the Commission, the Court said:

> "The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare United States v. New River Co., 265 U. S.

533, 68 L. Ed. 1165, 44 Sup. Ct. Rep. 610; Avent v. United States, 266 U. S. 127, 69 L. Ed. 202, 45 Sup. Ct. Rep. 34; United States v. Koenig Coal Co. No. 216, April 12, 1926 (270 U. S. 512, ante, 709, 46 Sup. Ct. Rep. 392). One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.

"All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. Pennsylvania R. Co. v. Kittanning Iron & Steel Mfg. Co., 253 U. S. 319, 323, 64 L. Ed. 928, 930, 40 Sup. Ct. Rep. 532; Edward Hines Yellow Pine Trustee v. United States, 263 U. S. 143, 145, 68 L. Ed. 216, 219, 44 Sup. Ct. Rep. 72. The charge here in question, although called a penalty, is in essence an additional demurrage charge, increasing at a step rate. Such additional charges increasing with the length of the period (263) of detention were introduced in respect to some cars by the National Car Demurrage Rules. See Rule 7.—Demurrage Charges §§ A and B. They were widely

applied while the railroads were under Federal control. See General Orders of the Director General No. 3, 7 and 7a. Bulletin No. 4, Revised (1919), pp. 146, 151: Supplement to Bulletin, Revised (1920), p. 44. The power to impose such charges, if reasonable, is clear. Those here in question have been found by the Commission to be reasonable. It is not claimed that there was not evidence to support the finding. Compare Louisiana & P. B. R. Co. v. United States, 257 U. S. 144, 66 L. Ed. 156, 42 Sup. Ct. Rep. 25."

C.

The Decision of the Court is not in Conflict with any decisions of this Court. On the Contrary it is in Harmony therewith.

To support its contention that the decision conflicts with decisions of this Court the petitioner has cited seven cases. All but two of these cases were decided prior to the enactment of the Car Service Act. Not one of these cases deal with a car service order. Not one of them announce a principle different from or in conflict with the decision herein. The most that can be said of the cases cited by the petitioner is that the carrier can only demand and receive the rates as provided in the tariff *while same is in force.* But there was no tariff in force during the period in question, because the service order specifically suspended the operation of any tariff which conflicted with the provisions of the service order. We submit that the decision is completely in harmony with the decisions of this Court which we have cited.

CONCLUSION.

In conclusion we submit that petitioner concedes that the Commission did have authority to issue Service Order No. 775. This Court has held that such service orders have the force of law. *Avent v. United States; United States v. Mich. Portland Cement Co., supra.* A reference to the service order (Rec. pp. 16-24) shows that same was issued October 9, 1947; that the demurrage charges as therein fixed, were in effect during the period while Armour & Company used the freight cars for storage pending the arrival of a vessel; that the operation of all conflicting tariff provisions during this period had been suspended by the Service Order.

The only question then is what did this service order mean? The District Court and the Court of Appeals for the Fifth Circuit held that it meant that because of the emergency requiring immediate action in all sections of the country, demurrage charges should be as prescribed in the order, same being effective October 15, 1947, and that tariff provisions in conflict therewith were suspended.

Paragraph (f) of the order reads:

> "Tariff provisions suspended (1) Except as provided in subparagraph (2) of this paragraph the operation of all rules, regulation or charges in so far as they conflict with the provisions of this section is hereby suspended."
>
> f (2) * * *

It is impossible in our opinion to find plainer language to express the intention of the Commission that prior tariff provisions were suspended and new charges substituted.

Therefore if the Commission had power to issue such an order, (and the petition for certiorari concedes that it did have such power (pet. p. 3)) then it follows that from or after October 15, 1947 there was no other demurrage tariff in existence, and carriers were obliged to charge, and shippers obliged to pay the demurrage charges prescribed in Car Service Order No. 775.

This regulation was nationwide in scope and effect. It applied to every carrier and every shipper, all of whom as well as the general public, were ~~been~~ given notice of the service order by the deposit of a copy of same in the office of the Secretary of the Interstate Commerce Commission and by filing it with the Director, Division of the Federal Register. All of this it is conceded was done.

In *13 Corpus Juris Secundum* 798 (Carriers) it is said,

> "Nevertheless it has been held that while the carrier may thereby subject itself to penalties imposed by law, its right to collect demurrage is not defeated by the fact that it has failed to file its tariff schedules as required or has failed to post the demurrage rules in its stations." See also *10 Corpus Juris*, (Carriers) par. 737; *Chic etc. R. Co. vs. Bernard-White* case Co. 171 Ill. App. 302 Aff. 235 U. S. 371, 59 L. Ed. 275, 35 Sup. Ct. 131.

We cannot better conclude this brief than by quoting from the last paragraph of the opinion of the Circuit Court of Appeals, (Rec. p. 44):

> "As a valid order of the Interstate Commerce Commission superseded and effectively suspended tariff provisions theretofore in effect, and likewise validly established the new demurrage charges from which the recovery sought and allowed in the present case was computed, the failure of the carrier to comply with the order of the Commission that it give notice of such suspension and fixing of new demurrage charges did not and could not, legally annul the Commission's order."

To hold with petitioner would mean that instead of uniformity and equality in demurrage charges, Armour and Company would pay lesser rates than were applicable for similar car detention or car service in every section of the country.

Respectfully submitted,

HENRY B. CURTIS,
CURTIS, FOSTER & DILLON,
711 American Bank Building,
New Orleans, Louisiana.

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel on this the .... day of December, 1951.